

**IN THE COURT OF APPEALS OF IOWA**

No. 2-1084 / 12-0469  
Filed February 13, 2013

**MONTAVIOUS SMITH,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Jon Fister,  
Judge.

Smith appeals from the denial of his application for postconviction relief.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel Regenold, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney  
General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant  
County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ. Tabor,  
J., takes no part.

**EISENHAUER, C.J.**

Montavious Smith appeals from the denial of his application for postconviction relief. He contends his trial attorney was ineffective in allowing him to enter an *Alford* plea<sup>1</sup> to kidnapping in the third degree without a sufficient factual basis. We affirm.

In 2004 Smith was charged by amended trial information with sexual abuse in the third degree and kidnapping in the third degree. Pursuant to a plea agreement, he entered an *Alford* plea to both charges and consented to proceeding immediately to judgment and sentencing. He did not appeal.

In 2006 Smith filed an application for postconviction relief, alleging in part his trial attorney was ineffective in allowing him to enter a plea to the kidnapping charge without a factual basis. After amendments in 2008 and 2012, the application was heard in February 2012. The court reviewed the minutes of evidence filed with the trial information and found they showed Smith performed a sex act on the victim when he was twenty years old and she was fourteen years old. The court concluded this evidence provided a factual basis for the sexual abuse charge. See Iowa Code § 709.4(2)(c)(4) (2003). The court also found the minutes contained evidence Smith grabbed the victim's arm, removed her from a public sidewalk, and pulled her behind a building into a grassy parking lot without her consent. The sex act was circumstantial evidence of Smith's

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<sup>1</sup> An *Alford* plea differs from a guilty plea because the defendant does not admit participating in the acts constituting the crime but consents to the imposition of a sentence. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *State v. Burgess*, 639 N.W.2d 564, 567 n.1 (Iowa 2001) (noting “[t]here is no material difference between the pleas, however, when a defendant intelligently concludes his interests require entry of a guilty plea and the State has overwhelming evidence of the defendant’s guilt”).

intent to commit sexual abuse. The court concluded this evidence provided a factual basis for the kidnapping in the third degree charge. See *id.* § 710.4. The court denied the application for postconviction relief, concluding counsel was not ineffective because the pleas were supported by factual bases.

On appeal, Smith contends the plea to the kidnapping charge was not supported by a factual basis. The elements of kidnapping in the third degree relevant here are (1) confining a person or removing a person from one place to another, (2) with the specific intent to subject the victim to sexual abuse, and (3) knowing he did not have the victim's consent or authority to do so. See *id.* §§ 710.1, 710.4; Iowa Crim. Jury Inst. 1000.4. Smith contends the confinement or removal was merely incidental to the sexual abuse and insufficient to support a kidnapping conviction. See *State v. Rich*, 305 N.W.2d 739, 745 (Iowa 1981) (noting the "confinement or removal must be more than slight, inconsequential, or an incident inherent in the crime of sexual abuse so that it has a significance independent from sexual abuse").

Smith's argument fails because the sexual abuse statute under which he was charged, section 709.4(2)(c)(4), has no confinement or removal incidental to or inherent in it. It encompasses even consensual sex and is "commonly referred to as statutory rape." *State v. Bruegger*, 773 N.W.2d 862, 867 (Iowa 2009). The cases Smith cites are inapposite because they deal with sexual abuse offenses other than statutory rape. Because Smith is five or more years older than the girl, who was fourteen at the time, he could have been found guilty of sexual abuse under section 709.4(2)(c)(4) even if the sex act was consensual, and without any confinement or removal. The confinement and removal here had a

significance independent from the sexual abuse and provided a factual basis for his plea to third-degree kidnapping. Smith's trial attorney was not ineffective in allowing Smith to enter an *Alford* plea to third-degree kidnapping because the plea was supported by a factual basis. See *State v. Carroll*, 767 N.W.2d 638, 644 (Iowa 2009) (noting an attorney has no duty to pursue a meritless issue).

**AFFIRMED.**